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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

THERESA REALI, MURRAY LEWIS, JOHN STOOS, JAY BAGGETT, and DON BLYTHE,

Petitioners,

v.

FEMINIST WOMEN'S HEALTH CENTER,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeal of California

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REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

This case involves a lawsuit by an abortion business, respondent Feminist Women's Health Center (FWHC), to restrict pro-life picketing, leafletting and counseling outside its abortion facility. FWHC succeeded in obtaining not only an injunction imposing a speech-free zone in front of the clinic, but also an award of some $100,000 in attorney fees.

Fully half of FWHC's Brief in Opposition to the Petition for Certiorari consists of paragraphs and sentences lifted verbatim from the lower court opinion. Not surprisingly, therefore, FWHC simply repeats the court's errors, and fails to address many of the issues raised in the petition. Thus, it stands undisputed that:

> 1) on at least two occasions the petitioners agreed to stipulate to an injunction prohibiting obstruction of access and other unlawful (and even lawful) conduct, thus rendering the litigation unnecessary to achieve that goal;
>
> 2) the court of appeal, in its purported "independent review of the record," failed to address even the most blatant errors in the trial court's findings of fact, such as the finding that access to the clinic was obstructed by crowds of "up to 150" anti-abortion demonstrators, when in fact, as petitioners pointed out to the court of appeal, these crowds were *pro*-abortion demonstrators; and
>
> 3) each of the petitioners may be liable for over $170,000,[1] based on the trial court's finding that they each committed "one or more" acts from a list of acts which includes constitutionally protected activity.

I. The Decision Below Conflicts with This Court's Decisions Forbidding Content-Based Regulation of Speech.

In its Brief in Opposition, FWHC for the most part simply repeats

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[1] The trial court initially awarded $99,106.98 in attorney fees, on September 30, 1991. App. 102a. On February 9, 1994, the court awarded $30,601.50 in attorney fees incurred in opposing petitioners' appeal. App. 105a. Interest on these judgments accrues at the rate of ten per cent per annum. Thus, at this time, petitioners' financial liability under this judgment is approximately $175,000. FWHC has recorded liens against the homes of three of the petitioners.

and restates the holding of the lower court, adding only an irrelevant discussion of the Labor-Management Reporting and Disclosure Act. Instead of explaining away the conflict between the lower court's holding and this Court's decisions in *Police Department v. Mosley*, 408 U.S. 92 (1972), and the other cases cited by petitioners, FWHC's brief highlights that conflict.

FWHC quotes *Planned Parenthood v. Aakhus*, 14 Cal. App. 4th 162, 17 Cal. Rptr. 2d 510 (1993), for the proposition that "the interests of [respondent] and its clients, rendering and receiving reproductive medical care, are mutual and inseparable." This "rule" means that any action taken by an abortion clinic to protect its business from picketers necessarily confers a significant benefit on its clients, and therefore warrants an award of fees under the relevant California statute. *See* Pet. at 3, 13–14. According to the court below, however, this same rule does not apply to action taken by other businesses seeking to protect themselves from labor picketing. Businessmen and employers not involved in abortion are presumed not to have conferred a benefit on the public, and to be acting solely from pecuniary motives. App. 33a–34a.[2] *See* Pet. § I.

The result of this reasoning is that those who speak on certain topics, and from certain viewpoints, are made to carry the extra burden of threatened liability for attorney fees, while other speakers face no such threat. This state-sanctioned discrimination violates the rights of free speech and equal protection, in conflict with this Court's precedents.

II. The Decision Below Conflicts with This Court's Decisions in *NAACP v. Claiborne Hardware* and *Hurley v. Irish-American Glib.*

FWHC relies on *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989), for the proposition that the "clearly erroneous standard" may govern factual review in a free speech case. In fact, *Harte-Hanks* holds the opposite: "Although *credibility* determinations are reviewed under the clearly-erroneous standard . . ., the reviewing court must examine for itself the *statements* in issue and the *circumstances* under which they were made to see whether they are of a character which the principles of the First Amendment protect." *Id.* at 688 (emphasis added; footnote, citation and editing marks omitted).

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[2] Of course, the California courts may later decide to single out other types of businesses as "public interest" favorites, thus entitling them to fees as well.

Thus, *Harte-Hanks* confirms petitioners' position and is consistent with *Hurley v. Irish-American Gay Lesbian and Bisexual Group of Boston*, 115 S. Ct. 2338 (1995). *Hurley* unequivocally holds that in a case like the present one, a reviewing court must make "an independent examination of the record as a whole, without deference to the trial court," to determine whether "the factual characteristics of petitioners' activity place it within the vast realm of non-expressive conduct," on the one hand, or "on the field of free expression," on the other. *Id.* at 2344. The court below, contrary to *Hurley*, simply viewed the facts "in the light most favorable to the judgment" of the trial court. App. 4a; *accord*, App. 108a, 118a.

FWHC contends that the petitioners equate an independent review of the record with reversal of the trial court. Opp. at 16. FWHC also contends that the appellate court "obviously" twice reviewed the record independently and "addressed all the issues raised by the petitioners" before affirming the judgment of the trial court. *Id.* This conclusion is far from "obvious."

From the time the trial court decision was rendered in this case, petitioners have made a simple and reasonable request, namely, that the court state which of the petitioners supposedly committed what unlawful acts on what occasions, and what is the evidence supporting this finding. The reason for this request was plain: to confront the court with the *absence* of such evidence and to counter FWHC's explicit plea that all pro-life demonstrators be "tarred with the same brush." R.T. 837; Pet. at 5. The trial court refused to make such particularized findings. The appellate court affirmed the trial court's refusal to specify in its statement of decision what unlawful activity each defendant had engaged in, holding instead that it sufficed to identify the unlawful acts of *other* defendants and "other anti-abortion protestors." App. 80a.

After remand from this Court, the court of appeals again refused either to identify specific evidence or to remand to the trial court for further findings. The assurance of the court of appeal that it had made an "independent examination of the whole record" rings hollow in light of its steadfast refusal to cite any specific testimony or other evidence from the record to support its conclusions.

The lower court's failure to make specific findings is especially egregious in light of the petitioners' meticulous presentation of the record in their briefs. Time after time petitioners pointed to the lack of evidence

of unlawful conduct by petitioners and to the fact that other alleged conduct was only engaged in by the defaulting defendants or other unnamed persons, not petitioners. Yet the court refused, in its "independent examination of the whole record," to address any of these evidentiary defects. This Court's precedents forbids such obstinate "screening of reality." *See* Pet. § III.

The court's mere statement that it made an independent examination does not satisfy the constitutional requirement that the characterization of the petitioners' conduct as unlawful "must be supported by findings that *adequately disclose the evidentiary basis for concluding that specific parties agreed to use unlawful means*, that carefully identify the impact of such unlawful conduct, and that recognize the importance of avoiding the imposition of punishment for constitutionally protected activity." *NAACP v. Claiborne Hardware*, 458 U.S. 886, 933–34 (1982) (emphasis added).

Clearly, the court's conclusory statement that, e.g., "there is substantial evidence that defendants, as well as other protesters, interfered with the sidewalk access to the clinic by means of physical obstruction . . .," App. 23a, does not adequately disclose the evidentiary basis for that finding.

On the issue of obstruction, the trial court found that, on some days, "up to 150 [anti-abortion] picketers . . . would position themselves in front of Physician's Medical Building along the sidewalk on J Street . . . making a human wall which blocked the front entrance to the Physician's Medical Building." App. 80a. In fact, there was simply no evidence of any large demonstrations by pro-life picketers, other than one or two large pickets held in compliance with the terms of the preliminary injunction. The trial court must have mistakenly been relying on photographs submitted by the petitioners showing a demonstration of 150–200 abortion *proponents* standing with arms locked in front of the building, one of several such demonstrations about which petitioner Baggett testified.

The petitioners pointed this error out to the appellate court, only to be met with no response whatsoever. Whatever an "independent review" means, it must surely embrace some examination and comment on the record when appellants point out uncontested evidence that the appellees, not they, are responsible for conduct for which the appellants have been held liable.

Each time either the trial court or the appellate court has ventured to make specific findings, the petitioners have refuted the findings by citation

to the record showing that the evidence was irrelevant, misconstrued, or non-existent. This undoubtedly explains why the appellate court's attempt to do so was largely abandoned after the petition for rehearing, *see* App. 151a, as well as why it has refused to remand and direct the trial court to make specific findings.

III. The Decision Below Conflicts with This Court's Decision in *Madsen v. Women's Health Center*

A. *The decision below explicitly predicates liability on constitutionally protected activity.*

As noted in the Petition, the court of appeal not only failed to make an independent examination of the record, but also ratified the trial court's erroneous and exaggerated characterization of the evidence. Further, the court studiously ignored petitioners' showing that they had offered to stipulate to an order prohibiting obstruction and other unprotected conduct. The court insisted that the litigation resulted from the petitioners' assertion of a right to obstruct and assault FWHC's clients, when in fact the petitioners defended the suit simply to maintain their right to engage in speech activity on the public sidewalk and in the parking lot.[3]

However, the court of appeals went further than simply chilling these petitioners' legitimate exercise of their free speech rights. In holding that the trial court's statement of decision was adequate to impose liability on the petitioners, the court necessarily held that gathering, demonstrating, picketing, chanting, and leafletting outside abortion facilities are themselves unprotected, "wrongful" activities.

First the court catalogued the pertinent findings:

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[3] Petitioners' right, under the California Constitution, to engage in peaceful public expression on the parking lot was an open question at the time this case went to trial. In fact, the local district attorney had informed a FWHC representative that the parking lot in question was quasi-public and that police would not arrest people picketing there. R.T. 1019–20; *see also* App. 6a. The cases relied on by the court of appeals in holding that the parking lot of a medical facility is not a public forum were both decided *after* the trial in this case. *Allred v. Shawley* 232 Cal. App. 3d 1489, 284 Cal. Rptr. 140 (1991) (filed July 31, 1991); *Planned Parenthood of San Diego and Riverside Counties v. Wilson*, 234 Cal. App. 3d 1662, 286 Cal. Rptr. 427 (1991) (filed June 28, 1991).

> Here, the statement of decision indicated, for example, that "[d]efendants and others, on a fairly regular basis between January of 1988 and April of 1990, have gathered in front of the Physician's Medical Building at 3701 J Street to demonstrate against abortions[,]" "would waive [sic] signs at plaintiff's clients and staff[,]" "would also chant, yell and use noise-making devices such as bullhorns and trumpets[,]" "would also attempt to force literature on plaintiff's clients[,]" "would persist in their attempts even after the client indicated her refusal[,]" "would reach for, bump into and surround plaintiff's clients and any persons accompanying the clients[,]" and "would record the identities of [plaintiff's] clients and staff either through the use of photographs, videotape, or the recordation of license plate numbers." No further specification is necessary.

App. 11a. Next, the court concluded that these actions, or any one of them, sufficed to establish liability:

> In their supplemental brief, defendants intimate that *Madsen v. Women's Health Center* . . . requires that specific findings of misconduct be made as to each defendant, rather than the trial court's generalized finding that defendants and others engaged in the *enumerated wrongful acts*. . . . It is sufficient the trial court found that defendants engaged in particular harassing and obstructive conduct and that the evidence discloses each of the defendants committed *one or more of the listed acts.*

App. 12a. (Emphasis added).

Thus, the lower court redefined protected speech activity such as picketing and leafletting[4] as "wrongful" conduct, and held that any individual who "commits" even one such act may be held liable for injunctive relief and substantial attorney fees.

B. *Confusion over the meaning of Madsen is growing in the lower courts.*

In the short period since the filing of the petition for certiorari, two

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[4] The trial court's statement of decision includes both "attempting to force literature" and "persisting in their attempts even after the client indicated her refusal." Thus, "forcing" literature means leafletting both *before* and after an intended recipient has indicated her refusal.

other decisions have come down, in the Second and Ninth Circuits, which dramatize the growing confusion of the lower courts over the meaning of *Madsen v. Women's Health Center* 114 S.Ct. 2516 (1994). Together with this case and a decision of the Supreme Court of California, these cases demonstrate the compelling need for review by this Court.

The first case, *Pro-Choice Network of Western New York v. Schenck*, No. 92-7302 (2d Cir. Sept. 28, 1995) (en banc) (1995 WL 570394), upholds both speech-free zones and personal "floating bubble" zones. These injunctive restrictions: (1) bar all "demonstrating" within fifteen feet of any doorway or parking lot entrance, as well as within fifteen feet of any person or vehicle seeking access to or leaving an abortion facility, except for sidewalk counseling by no more than two persons; and (2) prohibit such sidewalk counseling whenever the person counseled "wants to not have counseling, wants to leave, or walk away." A panel of the Second Circuit, properly applying *Madsen*, initially overturned these restrictions, which were in force at every abortion facility in the Western District of New York. *Pro-Choice Network of Western New York v. Schenck*, 34 F.3d 130 (2d Cir. 1994). After the appellate mandate had already issued, the Second Circuit allowed an untimely petition for rehearing en banc, and after rehearing reversed the panel.

The nine-judge lead opinion of Judge Oakes held that the speech restrictions were constitutional even though an initial, less restrictive temporary restraining order had already successfully ensured access.[5] Slip op. at 21-22. The lead opinion also held that this Court's decision did not invalidate a provision requiring counselors to back off fifteen feet whenever the intended audience requested. Slip op. at 26-27.

A ten-judge "concurring" opinion by Judge Winter was more sweeping in its revision of First Amendment law:

> Generally, targeted persons, whether they be customers of a business, residents of a particular house, workers at a firm, the trustees of a university, military recruiters, delegates at a political convention, or patients and employees of an abortion clinic, are not voluntarily exposed to the protests. . . .
>
> In my view, therefore, there is no right to invade the personal

[5] Like the court below in the instant case, the lead opinion minimized the significance of this Court's reliance in *Madsen* on the failure of an earlier, narrower order as a factor in upholding a broader injunction. Slip op. at 22; App. at 23a.

> space of individuals going about lawful business . . . or to do anything that cannot be fairly described as an attempt at peaceful persuasion. Moreover, an extensive record of coercion or obstruction is not required to justify an injunction requiring physical separation and an end to such conduct. The power of even isolated threats or obstructions to exert a chilling effect on some members of society need not be ignored. The timid have a right to go about their business, and it is no embarrassment for a federal court to say so.

Winter conc. at 5–6. In other words, everyone is a captive audience when coming from and going to a place of personal or professional business, simply because they did not choose to be exposed to the speech. The term "chilling effect" has been co-opted by Judge Winter to mean the effect of speech on the listener, not the effect of restrictions on a would-be speaker. Furthermore, Judge Winter explicitly endorses a one-strike-and-you're-out rule, by holding that even an isolated incident of obstruction may warrant a speech-free zone.

In an even more recent case, the Ninth Circuit upheld the imposition by ordinance of a personal "floating bubble" zone. *Sabelko v. City of Phoenix*, No. 94-15495 (9th Cir. Oct. 19, 1995) (1995 WL 611422), *rev'g* 846 F. Supp. 810 (D. Ariz. 1994). The challenged ordinance required any person engaged in "demonstration activity" within 100 feet of an abortion facility to "withdraw" at least eight feet from any person so requesting. The district court held that the restriction was unconstitutional, but a panel of the Ninth Circuit reversed. The majority held that *Madsen* had established standards for speech restrictions outside health care facilities, and that "the Supreme Court in *Madsen* expressly recognized that persons approaching a health care facility represent a 'captive audience,' thus rejecting the position . . . that a public area adjacent to a health care facility must be considered, for all purposes, an open forum." 1995 WL 611422 at *3. The fact that *Madsen* itself struck down a ban on approaching without consent did not preclude a ban on failing to withdraw upon request. *Id.* at *3–*4.

However, as Judge Meskill noted in his dissent in *Pro-Choice Network*, this Court has limited application of the "captive audience" doctrine to cases in which the speech intrudes on the home, or in which "the audience is physically constrained by its environment." Meskill dis. at 16 (citing *Lehman v. Shaker Heights*, 418 U.S. 298 (1974)). Consistent with those limitations,

> [t]he *Madsen* Court simply recognized that women *in* the clinic were "held 'captive' by medical circumstance," *Madsen*, 114 S. Ct. at 2526, thus supporting some of the injunction's restrictions, for example, those on banning loud noise levels or prohibiting the use of sound amplification equipment. This, however, does not mean that the women *approaching* the clinic are captive, and nothing in *Madsen* can be read as so holding.

Id. at ii, n.5 (original emphasis).[6]

Like the majorities in *Pro-Choice Network* and *Sabelko*, the California Supreme Court has also stretched the interest in protecting the health and safety of patients inside medical facilities, as expressed in *Madsen*, to justify restrictions on speech on the public sidewalk where those coming and going from such facilities may be present. *Planned Parenthood Shasta-Diablo v. Williams*, 7 Cal. 4th 860, 873 P.2d 1224, 30 Cal. Rptr. 2d 629 (1994) (upholding an injunctive speech-free zone even though the court explicitly acknowledged that access was not the issue, *id.* at 879 n.10, 873 P.2d at 1235 n.10, 30 Cal. Rptr. 2d at 640 n.10) *vacated*, 115 S. Ct. 413 (1994), *reinstated on remand*, 10 Cal. 4th 1009, 43 Cal Rptr. 2d 88, 898 P.2d 402 (1995), *petition for cert. filed*, 64 U.S.L.W. 3287 (U.S. Oct. 6, 1995) (No. 95-576).

In *Madsen*, this Court formulated a demanding standard of review for speech-restrictive injunctions. 114 S.Ct. at 2525-26. *Madsen* plainly calls for meticulous parsing of both the injunctive provisions at issue and the factual circumstances alleged to support those restrictions. Yet, in the wake of *Madsen*, lower courts have disregarded both the heightened scrutiny and the demanding factual showing *Madsen* requires, and reduced it to a

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[6] *See also Edwards v. City of Santa Barbara*, 883 F. Supp. 1379 (C.D. Cal. 1995), *appeal docketed* No. 95-55595 (9th Cir. May 5, 1995) (striking down ordinance establishing speech-free zones and personal bubble zones in front of health care facilities; "this Court notes that Defendants cite no authority for applying the captive audience doctrine to individuals on public sidewalks en route to medical treatment. Indeed, the captive audience doctrine has traditionally been limited to situations where an individual is at home. [citing *Frisby v. Schultz*, 487 U.S. 474 (1988)]. The captive audience doctrine has been applied only sparingly in public fora. [citing *Lehman v. Shaker Heights*, 418 U.S. 298 (1974)]").

simple license to uphold speech-free zones, whether stationary or floating, outside abortion facilities.[7]

IV. This Court Has Jurisdiction

FWHC claims that "independent and adequate state grounds" support the judgment below. Opp. § V. This argument is completely frivolous.[8]

This Court unquestionably has jurisdiction to review a state court's rejection, on the merits, of federal constitutional defenses. E.G., *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). *See* 28 U.S.C. § 1257(a) (this Court has certiorari jurisdiction over any final judgment of a state court of last resort "where any title, right, privilege, or immunity is specially set up or claimed under the Constitution").

> When a state . . . court [of last resort] denies the existence of a federal right and rests its decision on that basis, this Court unquestionably has jurisdiction to review the federal issue decided by the state court. To suggest otherwise would contradict principles laid down in the Judiciary Act of 1789, 1 Stat. 73, 85 and settled since *Martin v. Hunter's Lessee*, 1 Wheat. 304 (1816).

Quinn v. Millsap, 491 U.S. 95, 104 (1989).

CONCLUSION

This court should grant the petition for certiorari.

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[7] *See also Hill v. City of Lakewood*, No. 94CA0856 (Colo. Ct. App. July 13, 1995) (1995 WL 411983), *petition for cert. filed*, No. 95SC593 (Colo. Sept. 15, 1995) (upholding statewide statute prohibiting, in vicinity of medical facility, approaching within eight feet of another person without prior consent, for the purpose of leafletting, picketing, or engaging in protest, education, or counseling).

[8] FWHC raised the issue of independent state grounds, in exactly the same language, in its opposition to the petition for certiorari filed by petitioners in 1994. FWHC apparently does not consider this Court's order vacating the lower court decision as a rejection of this specious argument.

Respectfully submitted,

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